JUN 17 1944

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1943.

No. 172

WILLIAM PEITZMAN (now William A. Riley) and ETHEL PEITZMAN (now Ethel H. Riley), Doing Business as U. S. ELEVATED TANK MAINTENANCE COMPANY,
Petitioners,

v.

CITY OF ILLMO, a Municipal Corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Eighth Circuit

and

BRIEF IN SUPPORT THEREOF.

RUSH H. LIMBAUGH,
Cape Girardeau, Missouri,
WHITWORTH STOKES,
Nashville, Tennessee,
JACOB M. LASHLY,
705 Olive Street,
St. Louis, Missouri,
Attorneys for Petitioners.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

INDEX.

Page

Petition for writ of certiorari 1–7

Summary statement of the matter involved 1
Jurisdictional statement 4
Questions presented 5
Reasons relied on for allowance of writ 5
Prayer for writ 7

Brief in support of petition for writ of certiorari 8–36

Opinion of court below 8
Statement of the case 8
Jurisdictional statement 8
Summary of argument 8
Argument 12

Point I. Defendants' pleadings were stricken, not as a means of securing material evidence, but for the purpose of punishing them for their alleged past misconduct, in violation of the constitutional safeguards of due process and of the permissible scope of Rule 37 (d) of Civil Procedure 12

Point II. Certiorari should issue, for the Circuit Court of Appeals, in holding that the action is in tort and in upholding the amendment of April 21, 1943, on the ground that the first amended petition sounded in tort, is in conflict with applicable local law 24

Point III. The Circuit Court of Appeals erred in affirming the District Court which denied the admissibility of defendants' rebuttal evidence on the issue of intent and business methods 33

Conclusion 36

Table of Cases.

Bick v. Vaughn, 140 Mo. App. 595, 120 S. W. 618, 621 ..... 7, 10, 31

Bonaker v. Evans, 16 Q. B. 162 ..... 8, 16

Cole v. Ralph, 252 U. S. 286, 64 L. Ed. 567, 40 S. Ct. 321 ..... 11, 36

Dougherty v. California Kettleman Oil Royalties, Inc., 13 Cal. (2d) 174, 88 Pac. (2d) 690 (1939)..... 28
Ecker v. Western Pac. Railroad Corp., 318 U. S. 448, 87 L. Ed. 892, 63 S. Ct. 692.....11, 36
Erie Railroad Co. v. Tompkins, 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817.....10, 27, 31
Ex Parte Richard Quirin, 317 U. S. 1, 87 L. Ed. 3, 63 S. Ct. 1 .....8, 20
Ex Parte Wall, 107 U. S. 265, 27 L. Ed. 552.....8, 17
Feingold v. Walworth Bros., 238 N. Y. 446, 144 N. E. 675 .....9, 2[illegible] 24
Galpin v. Page, 85 U. S. 350, 18 Wall. 350, 21 L. Ed. 959 .....8, 16
Genuine Panama Hat Works, Inc., v. Webb, et al., 36 Fed. (2d) 265, 266 (1929; D. C., S. D. N. Y.).....9, 27
Graff v. Lemp Brewing Co., 130 Mo. App. 618, 109 S. W. 1044 .....6, 25, 26
Graves v. Waite, 59 N. Y. 156 (1874)..... 28
Hammond v. Berkowitz (1909), 139 Mo. App. 404, 123 S. W. 502 32
Hammond Packing Co. v. Arkansas, 212 U. S. 322, 53 L. Ed. 530, 29 S. Ct. 370.....6, 8, 19
Hovey v. Elliott, 167 U. S. 409, 42 L. Ed. 215, 17 S. Ct. 841 .....6, 8, 19, 20, 21, 22
Ingwerson v. Chicago & A. Ry. Co. et al. (1910), 150 Mo. App. 374, 130 S. W. 411..... 32
Jacobs v. Chicago, P. & St. L. R. Co. (Mo. App., 1918), 204 S. W. 954 .....7, 10, 31
Jensen v. Omaha & Council Bluffs St. Ry. Co., 128 Neb. 21, 257 N. W. 257.....7, 11, 35
Kirchner v. Coroner et al. (1938), 343 Mo. 448, 121 S. W. (2d) 796, 800..... 32
Kohnle v. Paxton, 268 Mo. 463, 188 S. W. 155, 159, 160 .....6, 9, 26
Lehtinen v. Continental Bldg. Co., 339 Mo. 438, 97 S. W. (2d) 102.....9, 26
Levy et al. v. Emerson Steuben Mills, Inc., 157 Misc. 666, 284 N. Y. S. 532.....9, 23

McVeigh v. U. S., 78 U. S. 259, 11 Wall. 259, 20 L. Ed. 80 ..... 8, 17
Meredith v. Winter Haven, 320 U. S. 228, 88 L. Ed. 1, 64 S. Ct. 7 ..... 10, 27, 31
Nathan v. Locke et al., 108 Cal. App. 158, 287 Pac. 550, 551, aff. 291 Pac. 286 (1930) 6, 10, 29
Norris v. Walker, 232 Mo. App. 645, 110 S. W. (2d) 404, 408 ..... 6, 9, 26
Parrott v. Atlantic & N. C. R. Co. (St. Ct., N. C., 1906), 140 N. C. 546, 53 S. E. 432 ..... 7, 11, 34
Peters v. Berkley et al., 219 App. Div. 261, 264, 219 N. Y. S. 709, 713 ..... 9, 23
Price v. Parker et al., 44 Misc. Rep. 582, 90 N. Y. S. 98, 99 (1904; S. Ct. Spec. Term, N. Y. County) 10, 28
Price et al. v. Whitaker, 273 Ky. 499, 117 S. W. (2d) 203, 204 (1938) 10, 28
Rosenthal & Doucette, Inc., v. United Last Co., 33 Fed. Supp. 213 (1940; D. C., D. Mass.) 29
Ryan Gulch Reservoir Co. v. Swartz, 83 Colo. 225, 263 Pac. 728 ..... 7, 11, 35
Shaw v. Great Atlantic & Pac. Tea Co., 189 S. C. 437, 1 S. E. (2d) 499, 500 (1939) 6, 9, 10, 27, 29
Southern Pac. R. Co. v. Gonzalez, 48 Ariz. 260, 61 Pac. (2d) 377 (1936) 6, 10, 28, 29
State of Missouri v. Cogue, 214 Mo. 344, 114 S. W. 8.. 14
Steele v. Brazier, 139 Mo. App. 319, 123 S. W. 477, 482 ..... 7, 10, 32
Story Parchment Co. v. Paterson Parchment Paper Co., 282 U. S. 555, 75 L. Ed. 544, 51 S. Ct. 248 ..... 11, 36
Vandenbark v. Owens-Illinois Glass Co., 311 U. S. 538, 85 L. Ed. 327, 61 S. Ct. 347 ..... 10, 27
Welch v. Jamaica Water Supply Co., 171 N. Y. S. 101 (1918; S. Ct., App. Term, Second Department) 28
Windsor v. McVeigh, 93 U. S. 274, 23 L. Ed. 914 ... 5, 8, 18
Derk P. Yonkerman Co. v. Fullers Adv. Agency, 135 Fed. 613 (1905; Cir. Ct., N. D. Illinois) 29

Table of Statutes.

Sec. 325, New York Civil Practice Act, Laws of 1920, Chap. 925 as amended (Ed. Cahill, Chicago).....

Rule 37 (d), Federal Rules Civil Procedure, 28 U. S. C. A., following Sec. 723c....4, 5, 6, 8, 12, 13, 15, 21, 2

Rule 81 (c), Federal Rules Civil Procedure, 28 U. S. C. A., following Sec. 723c.....5,

Sec. 240 (a), Judicial Code, 28 U. S. C. 347 (a).....

Table of Authorities.

Advisory Committee on Rules for Civil Procedure, Note to Rule 37 (d).....

Story, 2 Commentaries on the Constitution of the United States, Sec. 1789.....

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1943.

No.....

WILLIAM PEITZMAN (now William A. Riley) and ETHEL PEITZMAN (now Ethel H. Riley), Doing Business as U. S. ELEVATED TANK MAINTENANCE COMPANY,
Petitioners,

v.

CITY OF ILLMO, a Municipal Corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Eighth Circuit.

To the Honorable the Supreme Court of the United States:

Your petitioners respectfully show:

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This is an action at law brought in the Circuit Court of Scott County, Missouri, on July 22, 1941 by the City of Illmo, Missouri, respondent herein, against William Peitzman (now William A. Riley), and Ethel Peitzman (now

Ethel H. Riley), doing business as U. S. Elevated Tank Maintenance Company, petitioners herein. The original petition alleged that the parties entered into a contract whereby the defendants agreed to perform certain painting and repair work on the steel water tank of the City of Illmo; that the defendants breached said contract; did unnecessary work, failed to complete the agreed work, and damaged plaintiff in the amount of $5,000.00 (R. I, 6-10). On August 2, 1941, plaintiff amended its petition, adding charges of willful and malicious conduct on the part of the defendants in the above described actions, and praying for Four Thousand Dollars ($4,000.00) actual damages and One Thousand Dollars ($1,000.00) punitive damages (R. I, 22-27).*

On December 1, 1941, defendants being non-residents of Missouri removed the case to the United States District Court for the Southeast Division of the Eastern District of Missouri (R. I, 46). On April 4, 1942 defendant Ethel Peitzman filed a counterclaim on two counts, one for labor and material, and the other for libel (R. I, 67-70). To secure certain information concerning defendants' business and work, plaintiff undertook extensive investigations and took depositions in some 48 cities of 13 states (R. I, 138) during the period from July, 1941 (R. III, 1) to September 24, 1942 (R. III, 255). After having thus secured the desired information, then, on October 7, 1942, plaintiff filed a motion to change the amount of punitive damages prayed for from One Thou-

*The prayer for damages as printed in the record reads $5,000.00 and $20,000.00 respectively, and not $4,000.00 and $1,000.00. This difference is due to the fact that said first amended petition was subsequently amended by interlineation, first by changing the amount of punitive damages prayed from $1,000.00 to $10,000.00 (R. I, 115; II, 982) and later to $5,000.00 actual and $20,000.00 punitive damages (R. II, 986). The fact that the first amended petition prayed for $4,000.00 actual and $1,000.00 punitive damages is also shown by the recital thereof in defendants' petition for removal to the federal court (R. I, 47, § 5). Moreover, on July 23, 1941 the court ordered plaintiff to file bond in double the amount sworn to in the attachment affidavit (R. I, 56) and plaintiff filed a $10,000.00 bond on August 2, which is the same date of its first amended petition (R. I, 57).

sand Dollars ($1,000.00) to Ten Thousand Dollars ($10,000.00), and a motion to strike defendants' pleadings on the ground that while the case was pending in the state court defendant William Peitzman had given improper answers to questions propounded to him in the course of certain depositions, and on the further ground that both defendants had willfully failed to appear and to produce their employees as well as their books and records at certain depositions (R. I, 111-116). Both motions were granted by the District Court, which noted defendants' default (R. I, 116).

By its investigation and the depositions taken as aforementioned, plaintiff was trying to establish that defendants had a record of dissatisfied customers in prior and similar transactions, in order to show their intent and business methods at Illmo. To rebut said evidence, defendants repeatedly moved the Court for leave to take depositions to show that they had a record of work satisfactorily performed over a number of years (R. I, 185, 200, 208, 209; II, 983, 984), but their motions were always denied by the Court (R. I, 197-198, 200; II, 983-984) on the ground that such testimony would not be admissible (R. I, 235).

A jury trial was held to determine the amount of damage. On August 21, 1943, after the jury was impaneled and sworn, the Court allowed plaintiff to amend its petition by striking from paragraph 17 thereof the phrase "on account of the breach of said agreement by Defendant" over the objection of defendants that this amendment amounted to changing the cause of action from contract to tort (R. I, 200, 210). After the evidence had been concluded, the Court allowed plaintiff to increase the amount of compensatory damages prayed for up to Five Thousand Dollars ($5,000.00) and the amount of punitive damages to Twenty Thousand Dollars ($20,000.00) (R. I, 201-202; II, 969, 986). The jury returned a verdict for plaintiff in

the amount of $4,000.00 compensatory and $10,000.00 punitive damages and the Court entered judgment accordingly (R. II, 978, 986).

Upon denial of their motion for new trial, defendants perfected their appeal to the United States Circuit Court of Appeals for the Eighth Circuit (R. II, 987). Their appeal was denied (R. IV, 6-21) and so was their petition for rehearing duly filed with the court (R. IV, 23-40, 41).

JURISDICTIONAL STATEMENT.

The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code, 28 U. S. C. 347 (a), as amended:

(1) This case involves an important question of practice presented under the Federal Rules of Civil Procedure, which has not been, but should be, settled by this court, namely, the question of the permissible scope of application of Rule 37 (d) of the Federal Rules of Civil Procedure.

(2) By deciding that the action was in tort, and upholding the amendment of August 21, 1943, the Circuit Court of Appeals has decided important questions of local law in a way probably in conflict with applicable local decisions, and on the basis of a decision of a Missouri appellate court, which had been overruled by the Supreme Court of Missouri.

(3) The Circuit Court of Appeals has decided an important question of local law in a way probably untenable and in conflict with the weight of authority, by upholding the District Court which denied the admissibility of evidence in rebuttal offered by defendants to negative method and intent put in issue by plaintiff.

This petition is timely since the judgment of the Circuit Court of Appeals for the Eighth Circuit in question herein

was rendered on April 17, 1944 (R. IV, 22), and the petition for rehearing was denied by that Court on May 6, 1944 (R. IV, 41).

THE QUESTIONS PRESENTED.

1. Did the United States Circuit Court of Appeals for the 8th Circuit err in holding that the order of the District Court striking out defendants' pleadings was not a violation of due process, but was a permissible application of Rule 37 (d) of the Federal Rules of Civil Procedure?

2. Did the Circuit Court of Appeals err in holding that the cause of action sounded in tort and not in contract?

3. Did the Circuit Court of Appeals err in holding that the amendment of plaintiff's petition at the trial on April 21, 1943 striking out the words "on account of the breach of said agreement by defendant" was permissible on the ground that plaintiff had already amended its petition in the State Court to ask for exemplary damages?

4. Did said Circuit Court of Appeals err in refusing to follow the law of Missouri on the propriety of said amendment, in view of Federal Rule 81 (c) of the Rules of Civil Procedure which circumscribes the scope of the federal rules to the procedure subsequent to the removal?

5. Did the Circuit Court of Appeals err in refusing to set aside the ruling of the District Court which denied the admissibility of defendant's rebuttal evidence on the issue of intent and business method?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. The Circuit Court of Appeals has decided an important federal question relating to the permissible scope and applicability of Rule 37 (d). Although the precise question involved here has never been determined by this Court, Rule 37 (d) was here applied in a way which is apparently in conflict with the principles of **Windsor v.**

McVeigh, 93 U. S. 274, 23 L. Ed. 914; **Hovey v. Elliott**, 167 U. S. 409, 42 L. Ed. 215, 17 S. Ct. 841, and of **Hammond Packing Co. v. Arkansas**, 212 U. S. 322, 53 L. Ed. 530, 29 S. Ct. 370.

The question is one of a general nature and, unless review is granted, a dangerous precedent would be established by the decision of the Circuit Court of Appeals leading to the use of Rule 37 (d) as a summary method of criminal punishment.

2. By holding that the cause of action was in tort and upholding the amendment of April 21, 1943, the Circuit Court of Appeals has reached a decision in conflict with the applicable local law on account of the following reasons:

a. The Circuit Court of Appeals relied on **Graff v. Lemp Brewing Co.**, 130 Mo. App. 618, 109 S. W. 1044, which has been overruled by the Supreme Court of Missouri in **Kohnle v. Paxton**, 268 Mo. 463, 479, 188 S. W. 155, 159, 160. See also **Norris v. Walker**, 232 Mo. App. 645, 110 S. W. (2) 404, 408.

b. The Court of Appeals has failed to follow the weight of authority which holds that, in case of doubt whether a petition is in contract or in tort, it should be construed to be in contract.

Nathan v. Locke et al., 108 Cal. App. 158, 291 Pac. 286, affirming 287 Pac. 550, 551;

Shaw v. Great Atlantic & Pac. Tea Co., 189 S. C. 437, 442, 1 S. E. (2) 499, 500;

Southern Pac. R. C. v. Gonzales, 48 Ariz. 260, 283, 61 Pac. (2) 377, 386.

c. By testing the propriety of the amendment of April 21, 1943, not on the basis of the original petition but on the basis of pleadings as amended in the State Court, the Circuit Court of Appeals either has extended the permissible scope of Rule 81 (c) of the Federal Rules of

Civil Procedure, or has decided a question of local law in conflict with a well established body of Missouri decisions.

Jacobs v. Chicago P. & St. L. R. Co. (Mo. App. 1918), 204 S. W. 954;
Bick v. Vaughn, 140 Mo. App. 595, 120 S. W. 618, 621;
Steele v. Brazier, 139 Mo. App. 319, 123 S. W. 477, 482.

3. In upholding the District Court's rulings which denied the admissibility of defendants' rebuttal evidence on the issue of method and intent, the Circuit Court of Appeals decided an important question of local law in a way which appears to be in conflict with the weight of the authorities.

Parrott v. Atlantic & N. C. R. Co., 140 N. C. 546, 53 S. E. 432;
Ryan Gulch Reservoir Co. v. Swartz, 83 Colo. 225, 263 Pac. 728;
Jensen v. Omaha & Council Bluffs Street Ry. Co., 128 Nebr. 21, 257 N. W. 257.

Wherefore, your petitioners pray that a writ of certiorari issue in this cause to review the final judgment of the United States Circuit Court of Appeals for the Eighth Circuit entered against your petitioners on April 17, 1944 (R. IV, 6-22), to the end that said judgment be reversed by this Honorable Court, and for such further relief as to this Honorable Court may seem proper.

June 9, 1944.

RUSH H. LIMBAUGH,
Cape Girardeau, Missouri,
WHITWORTH STOKES,
Nashville, Tennessee,
JACOB M. LASHLY,
St. Louis, Missouri,
Attorneys for Petitioners.

BRIEF.

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit in question here has not yet been reported. It is printed in full in the record herein (R. IV, 6-22).

The statement of the case and the grounds on which jurisdiction is invoked are included heretofore in the petition for certiorari.

SUMMARY.

I.

1. **Defendants' Pleadings Were Stricken, Not as a Means of Securing Material Evidence, But for the Purpose of Punishing Them for Their Alleged Past Misconduct, in Violation of the Constitutional Safeguards of Due Process, and of the Permissible Scope of Rule 37 (d) of Civil Procedure.**

Bonaker v. Evans, 16 Q. B. 162;
Galpin v. Page, 85 U. S. 350, 18 Wall. 350, 21 L. Ed. 959;
Ex Parte Wall, 107 U. S. 265, 27 L. Ed. 552;
McVeigh v. U. S., 78 U. S. 259, 11 Wall. 259, 20 L. Ed. 80;
Windsor v. McVeigh, 93 U. S. 274, 23 L. Ed. 914;
Hovey v. Elliott, 167 U. S. 409, 42 L. Ed. 215, 17 S. Ct. 841;
Hammond Packing Co. v. Arkansas, 212 U. S. 322, 53 L. Ed. 530, 29 S. Ct. 370;
Ex Parte Richard Quirin, 317 U. S. 1, 87 L. Ed. 3, 63 S. Ct. 1;
Rule 37 (d), Federal Rules of Civil Procedure, 28 U. S. C., following Sec. 723c;
Note thereto of the Advisory Committee on Rules for Civil Procedure;
Story, 2 Commentaries on the Constitution of the United States, Sec. 1789.

2. **By the Striking Out of Defendants' Affirmative Defenses and Counterclaims Upon Their Failure to Appear at Certain Depositions Set by Plaintiff, Due Process Was Violated Because the Presumption of Pro Confesso Cannot Be Stretched to Cover Matters Not Involved in Plaintiff's Pleadings.**

Feingold v. Walworth Bros., 238 N. Y. 446, 144 N. E. 675;

Peters v. Berkley et al., 219 App. Div. 261, 264, 219 N. Y. S. 709, 713;

Levy et al. v. Emerson Steuben Mills, Inc., 157 Misc. 666, 284 N. Y. S. 532;

Sec. 325, New York Civil Practice Act, Laws of 1920, Chap. 925, as amended (Ed. Cahill, Chicago).

II.

Certiorari Should Issue for the Circuit Court of Appeals, in Holding That the Action Is in Tort and in Upholding the Amendment of April 21, 1943, on the Ground That the First Amended Petition Sounded in Tort, Is in Conflict With Applicable Local Law.

1. The cause of action sounded in contract and the contrary holding of the Circuit Court of Appeals was based in part on an overruled Missouri decision.

Graff v. Lemp Brewing Co., 130 Mo. App. 618, 109 S. W. 1044, on retrial reported in 145 Mo. App. 364, 129 S. W. 1005, and overruled in Kohnle v. Paxton, 268 Mo. 463, 479, 188 S. W. 155;

Lehtinen v. Continental Bldg. Co., 339 Mo. 438, 97 S. W. (2) 102;

Norris v. Walker, 232 Mo. App. 645, 110 S. W. (2) 404;

Genuine Panama Hat Works, Inc., v. Webb et al., (D. C. N. Y.), 36 F. (2) 265;

Shaw v. Great Atlantic & Pac. Tea Co., 189 S. C. 437, 1 S. E. (2) 499;

Price et al. v. Whitaker, 273 Ky. 499, 117 S. W. (2) 203;
Price v. Parker et al., 44 Misc. Rep. 582, 90 N. Y. S. 98;
Erie Railroad Co. v. Tompkins, 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817;
Meredith v. Winter Haven, 320 U. S. 228, 88 L. Ed. 1, 64 S. Ct. 7;
Vandenbark v. Owens-Illinois Glass Co., 311 U. S. 538, 85 L. Ed. 327, 61 S. Ct. 347.

2. In case of doubt as to whether a petition sounds in contract or in tort, the petition should be construed to be in contract.

Nathan v. Locke et al., 108 Cal. App. 158, 291 Pac. 286, affirming 287 Pac. 550, 551;
Shaw v. Great Atlantic & Pac. Tea Co., 189 S. C. 437, 1 S. E. (2) 499;
Southern Pac. R. Co. v. Gonzales, 48 Ariz. 260, 61 Pac. (2) 377.

3. In upholding the amendment of April 21, 1943, on the ground that the first amended petition in the State Court sounded in tort, the Circuit Court of Appeals overlooked the point that, under Missouri law, the propriety of amendments should be tested by a comparison with the original petition.

Jacobs v. Chicago, P. & St. L. R. Co. (Mo. App.), 204 S. W. 954;
Bick v. Vaughn, 140 Mo. App. 595, 120 S. W. 618;
Steele v. Brazier, 139 Mo. App. 319, 123 S. W. 477;
Rule 81 (c), Federal Rules of Civil Procedure, 28 U. S. C., following Section 723c.

III.

The Circuit Court of Appeals Erred in Affirming the District Court Which Denied the Admissibility of Defendants' Rebuttal Evidence on the Issue of Intent and Business Methods.

Parrott v. Atlantic & N. C. R. Co., 140 N. C. 546, 53 S. E. 432;

Ryan Gulch Reservoir Co. v. Swartz, 83 Colo. 225, 263 Pac. 728;

Jensen v. Omaha & Council Bluffs Street Ry. Co., 128 Nebr. 21, 257 N. W. 257;

Ecker v. Western Pacific Railroad Corp., 318 U. S. 448, 87 L. Ed. 892, 63 S. Ct. 692;

Story Parchment Co. v. Paterson Parchment Paper Co., 282 U. S. 555, 75 L. Ed. 544, 51 S. Ct. 248;

Cole v. Ralph, 252 U. S. 286, 64 L. Ed. 567, 40 S. Ct. 321.

ARGUMENT.

I.

Defendants' Pleadings Were Stricken, Not as a Means of Securing Material Evidence, But for the Purpose of Punishing Them for Their Alleged Past Misconduct, in Violation of the Constitutional Safeguards of Due Process and of the Permissible Scope of Rule 37 (d) of Civil Procedure.

On October 13, 1942, the District Court ordered defendants' pleadings stricken out and noted their default in purported application of Rule 37 (d) of the Federal Rules of Civil Procedure, 28 U. S. C., following § 723c. The Rule reads as follows:

> "Failure of Party to attend or serve answers. If a party or an officer or managing agent of a party willfully fails to appear before the officer who is to take his deposition, after being served with a proper notice, or fails to serve answers to interrogatories submitted under Rule 33, after proper service of such interrogatories, the court on motion and notice may strike out all or any part of any pleading of that party, or dismiss the action or proceeding or any part thereof, or enter a judgment by default against that party."

No interrogatories were served in the present case under Rule 33, and the striking of defendants' pleadings was based on their failure to appear and testify at certain depositions set by plaintiff.

In upholding the District Court, the Circuit Court of Appeals indicated that defendants here were not being punished for contempt, but that they had had their pleadings stricken "for violation of a rule of procedure" (R. IV, 13). This is challenged by your petitioners on the

basis of undisputed facts disclosed by the printed record herein. The present is not a case in which the District Court could have entered the right order on an erroneous ground and the appellate court could have upheld the decision on a different ground. The record shows beyond dispute that Rule 37 (d) could not be used as a "means of compelling the production of evidence," for the simple reason that plaintiff did not resort to Rule 37 (d) when defendants first failed to appear or answer at the designated depositions; but, on the contrary, undertook to and succeeded in securing the desired information in other ways. It was only upon completion of its investigation that plaintiff decided to utilize defendants' **past misconduct** in order to have their pleadings stricken out and judgment by default entered. This is unmistakably evidenced by the record.

For example, on July 26, 1941, when for the first time defendants failed to answer at depositions set by plaintiff, counsel for plaintiff volunteered the following statement:

> "I think that's all the questions I care to ask. The witness has not been bona fide, but I've decided that I'm not going to ask commitment. I have another remedy" (R. III, 24).

Thereafter, plaintiff undertook to secure the desired evidence through various means. No claim is made that defendants' action prevented plaintiff from preparing its case. This is clearly shown by the record. At the hearing on his motion to strike, plaintiff's counsel testified as follows (R. I, 138):

> "A. Another reason, I wanted to know whether or not he [Mr. Peitzman] was connected with it [the firm]; he claimed he was only an employe. I was trying to find out if he wasn't falsely testifying. I wanted to know his relationship to this company. If he said he got commissions I was going to ask for his books.

Q. Other than the thirty odd pages that you asked Mr. Peitzman, what other information was it you wanted at Waterloo and the other places? What is it that you have been denied in your investigation of Mr. Peitzman, other than the records down at Memphis? A. I wanted to know, when I first began this lawsuit, what this company was, who operated it, where they operated and how they operated and what places they operated, in order that I might find out just what kind of people I was dealing with. **If he or his wife had given me that testimony or those books and records, I would have been saved going to forty-eight cities, thirteen different states and traveling twelve thousand miles.** He could have given me a hundred places where he operated and where he pulled the same thing he did at Illmo." (Our emphasis.)

What plaintiff intended to accomplish by its motion to strike was to punish defendants. This is shown again by the fact that at the same hearing on the motion to strike Judge Finch, of counsel for plaintiff, cited a **criminal proceeding for perjury** in **State of Missouri v. Cogue**, 214 Mo. 344, 114 S. W. 8, as an analogous situation (R. I, 118).

Similarly, the District Court showed a clear purpose of punishing defendants for **perjury of one of them.** At the same hearing the following discussion took place between the trial court and counsel:

"Judge Finch: The whole thing through here shows perjury.

The Court: That is enough.

* * * * * * *

Mr. Limbaugh: It makes a difference, for the reason that, under the rules for taking depositions in Federal Court, I think a great deal more of liberality is **allowed.**

The Court: In the way of perjury?

* * * * * * *

> Mr. Limbaugh: Not at all. There is no perjury here.
> The Court: When this man testified that he didn't remember whether he had been there an hour or five years, don't you think that is perjury on the face of it?" (R. I, 119.)

And again:

> "The Court: The witness was under oath. He didn't take the position that he didn't have to answer or refuse to answer, but he answered that he didn't remember. It is obvious perjury. There is no question about that" (R. I, 167).

Thus, Rule 37 (d) appears to have been applied here as a means of punishment for **past misconduct** and not as a procedural devise, as "a means of compelling the production of evidence." Rule 37 (d), therefore, was used in violation of the Fifth Amendment to the Constitution of the United States. The "due process" clause assures the right to be heard in one's defense.

Story, in his treatise on the Constitution (Vol. 2, Sec. 1789), speaking of the clause in the Fifth Amendment, where it is declared that no person "shall be deprived of life, liberty, or property without due process of law," says:

> "The other part of the clause is but an enlargement of the language of Magna Charta, 'Nec super eum ibimus, nec super eum mittimus, nisi per legale judicum parium suorum, vel per legem terrae' (neither will we pass upon him, or condemn him, but the lawful judgment of his peers, or by the law of the land). Lord Coke says that these latter words 'per legem terrae' (by the law of the land), mean by due process of law, that is, without due presentment or indictment, and being brought in to answer thereto by due process of the common law. So that this clause in effect affirms the right of trial according to the process and proceedings of the common law."

This principle lies at the very foundation of our common law, and rests upon its deepest roots.

In the English case of **Bonaker v. Evans** (1854), 16 Q. B. 162, 170, the Court stated as follows:

> "* * * no proposition can be more clearly established than that a man cannot incur the loss of liberty or property for an offense by a judicial proceeding until he has had a fair opportunity of answering the charge against him, unless indeed the legislature has expressly or impliedly given an authority to act without that necessary preliminary. This is laid down in Bagg's Case, Coke Rep. pt. 11, 93b, 99a; Rex v. University of Cambridge (Dr. Bentley's Case), 1 Strange 557; Rex v. Benn, 6 T. R. 198; Harper v. Carr, 7 T. R. 270; and Rex v. Gaskin, 8 T. R. 209; and many other cases, concluding with that of Capel v. Child, 2 Cromp. & J. 558, in which Bayley, B., says he knows of no case in which you are to have a judicial proceeding by which a man is to be deprived of any part of his property without his having an opportunity of being heard. That case was a very strong one, and shows how firmly the court adheres to that great principle of justice, that, in every judicial proceeding 'qui aliquid statuerit parte inaudita altera aequum licet statuerit, non aequus fuerit.'"

A similar rule is laid down by early decisions of this Honorable Court.

In **Galpin v. Page**, 83 U. S. 350, 18 Wall. 350, 368-369, 21 L. Ed. 959, 963, speaking for the Court, Mr. Justice Field stated as follows:

> "It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in court, by which is meant, until he has been duly cited to appear, **and has been afforded an opportunity to be heard.** Judgment without such citation and opportunity wants all

> the attributes of a judicial determination; it is judicial usurpation and oppression, and never can be upheld where justice is justly administered." (Our emphasis).

Again, in **Ex Parte Wall**, 107 U. S. 265, 289, 27 L. Ed. 552, 562, Justice Bradley, rendering the Court's opinion, quoted with approval Judge Cooley's discussion of "due process of law" in his Constitutional Limitations, p. 353, where he says:

> "Perhaps no definition is more often quoted than that given by Mr. Webster in the Dartmouth College Case, 17 U. S. 4 Wheat. 518 [4 L. Ed. 629]: 'By the law of the land is most clearly intended the general law; a law which hears before it condemns, which proceeds upon inquiry and renders judgments only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society.'"

These general and fundamental principles were early applied to the striking of litigants' pleadings as a measure of punishment—which properly was construed as depriving litigants of their day in Court.

In **McVeigh v. United States**, 78 U. S. 259, 11 Wall. 259, 267, 20 L. Ed. 80, 81, respondent's pleadings had been stricken out by the trial court on the ground that respondent was "a resident of the City of Richmond, within the Confederate lines, and a rebel." Rendering the Court's opinion, Mr. Justice Swayne stated:

> "In our judgment the district court committed a serious error in ordering the claim and answer of the respondent to be stricken from the files. As we are unanimous in this conclusion, our opinion will be confined to that subject. The order, in effect, denied the respondent a hearing. It is alleged that he was in the position of an alien enemy, and hence could have no locus standi in that forum. If assailed there,

he could defend there. The liability and the right are inseparable. A different result would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt on the subject. It would be contrary to the first principles of the social compact, and of the right administration of justice. Calder v. Bull, 3 Dall. 388; Bonaker v. Evans, 16 Ad. & E. 170; Capel v. Child, 2 Cromp. & J. 574."

This language was quoted with approval in **Windsor v. McVeigh**, 93 U. S. 274, 277, 23 L. Ed. 914, 915-916, in which the Court, speaking through Mr. Justice Field, said:

"The principle stated in this terse language lies at the foundation of all well-ordered systems of jurisprudence. Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal. That there must be notice to a party of some kind, actual or constructive, to a valid judgment affecting his rights, is admitted. Until notice is given, the court has no jurisdiction in any case to proceed to judgment, whatever its authority may be, by the law of its organization, over the subject-matter. But notice is only for the purpose of affording the party an opportunity of being heard upon the claim of the charges made; it is a summons to him to appear and speak, if he has anything to say why the judgment sought should not be rendered. A denial to a party of the benefit of a notice would be in effect to deny that he is entitled to notice at all, and the sham and deceptive proceeding had better be omitted altogether. It would be like saying to a party, Appear and you

shall be heard; and, when he has appeared, saying Your appearance shall not be recognized, and you shall not be heard. In the present case, the district court not only in effect said this, but immediately added a decree of condemnation reciting that the default of all persons had been duly entered. It is difficult to speak of a decree thus rendered with moderation; it was in fact a mere arbitrary edict clothed in the form of a judicial sentence."

These authorities were reviewed and quoted with approval in **Hovey v. Elliott**, 167 U. S. 409, 42 L. Ed. 215, 17 S. Ct. 841. In this case, the Court held that:

"The case at bar is within the principle of the decision in Windsor v. McVeigh * * *." (167 U. S., loc. cit. 445, 42 L. Ed., loc. cit. 230.)

"The right which was here denied by rejecting the answer and taking the bill for confessed because of the contempt involved an essential element of due process of law * * *." (167 U. S., loc. cit. 444, 42 L. Ed., loc. cit. 230.)

It is respectfully submitted that the present case is within the rule of the **Hovey** case. This Court there stated the law of the land in 1897, and that statement has been approved ever since. One exception to the stated rule has been recognized in **Hammond Packing Co. v. Arkansas**, 212 U. S. 322, 53 L. Ed. 530, 29 S. Ct. 370, which has no application, we think, to the case at bar.

In the **Hammond** case, defendant's pleadings were stricken out upon its refusal to produce certain records and witnesses **in pursuance of a court order.** Plaintiff was thus incapacitated to obtain material evidence, and in order to secure the speedy disposition of the case, defendant's conduct was construed as an admission of want of merit in the asserted defense. There was no delay on the part of plaintiff in filing its motion to strike,

nor was there any effort on its part to secure the desired evidence *aliunde*. Thus, the Court's order striking the pleadings of defendant was based strictly on the procedural need to compel the production of material evidence—and not on an attempt to punish defendant for past misconduct.

It should be noted that the **Hovey** case was expressly approved and distinguished by the Court. More recently, the distinction between these two cases and their respective relation to Rule 37 (d) of Civil Procedure was aptly stated by the Advisory Committee on Rules for Civil Procedure in its annotation to said rule:

> "The provisions of this rule authorizing orders establishing facts or excluding evidence or striking pleadings, or authorizing judgments of dismissal or default, for refusal to answer questions or permit inspection or otherwise make discovery, are in accord with Hammond Packing Co. v. Arkansas, 212 U. S. 322, 29 S. Ct. 370, 53 L. Ed. 530, 15 Ann. Cas. 645 (1909), which distinguishes between **the justifiable use of such measures as a means of compelling the production of evidence,** and their unjustifiable use as in Hovey v. Elliott, 167 U. S. 409, 17 S. Ct. 841, 42 L. Ed. 215 (1897), for the mere purpose of punishing for contempt." (Our emphasis.)

Under this principle, it appears that the result reached in the present case is clearly in conflict with the principle laid down by this Court in **Hovey v. Elliott,** namely, that due process of law signifies a right to be heard in one's defense, and that a decree *pro confesso* entered against a defendant after striking his answer from the files for contempt of court is void.

As this Court recently expressed it in **Ex Parte Richard Quirin**, 317 U. S. 1, 25, 87 L. Ed. 3, 11:

> "We are not here concerned with any question of the guilt or innocence of petitioners. Constitutional

> **safeguards for the protection of all who are charged with offenses are not to be disregarded in order to inflict merited punishment on some who are guilty."**

The constitutional guaranty of a day in court should not so easily be denied under the alleged application of a procedural means to secure production of evidence. In the present case, plaintiff obviously used Rule 37 (d) to punish defendants for action committed some one or two years before. Should such procedure receive the indirect approval of this Court, the way would be open to punish litigants for recalcitrant conduct committed five, ten years before, and their adversaries enabled to first prepare their cases and then release the thunderbolt which would paralyze all resistance. The scope of judgments *pro confesso*, based on a presumption of law, should be carefully circumscribed to prevent the abuse of a rule established as an exceptional method of overcoming a specific procedural situation.

The record in the present case shows beyond dispute that plaintiff and the District Court meant to punish defendants for alleged perjury and misconduct. Had plaintiff intended to rely on the "presumption" of the Hammond case, it would not have gone to 48 cities in some 13 states to obtain the desired evidence (R. I, 138). **Past misconduct**, whether perjury or not, is no ground for application of Rule 37 (d), which concerns the **present** only, "If a party * * * **fails** to appear." Only **present** failure to appear or answer may warrant a default judgment resting on a presumption of *pro confesso*. But where, as here, plaintiff has not invoked Rule 37 (d) at the time when defendants failed to appear, but waited until the case was prepared for trial on the basis of evidence secured *aliunde*, then the striking of pleadings cannot be other than punishment for past misconduct. Rule 37 (d) was not intended to accomplish any such purpose, and the doctrine of **Hovey v. Elliott** was clearly violated.

By this means your petitioners were led away defenseless, without a day in court. Thus interpreted and applied, the rule would be in direct conflict with the rights of life, liberty and property preserved to them by the due process requirement of the Fifth Amendment. As a rule of civil procedure, as an aid to preparation for trial, and the discovery of facts to be used on trial to further the ends of justice, the rule is a useful mechanical instrument. Your petitioners venture to suggest, however, that the introduction of a construction which would tend to make it a device of the Court for the punishment of contemnors, is but to enlarge the intended function of rule 37 (d) and to violate the holding of **Hovey v. Elliott.**

2. It should also be noted that under Rule 37 (d) the Court "may strike out **all or any part** of any pleading." (Our emphasis.)

A similar statutory provision* was construed by the New York Court of Appeals in **Feingold v. Walworth Bros.** (1924), 238 N. Y. 446, 144 N. E. 675. Rendering the Court's opinion, Judge Pound stated as follows (238 N. Y., loc. cit., pp. 454-455):

> "The line may thus be definitely drawn between the proper punishment for suppressing evidence and the

*Section 325 of the New York Civil Practice Act, Laws of 1920, Chap. 925 as amended (Cahill's New York Civil Practice Act) reads as follows: "Where an order directs a discovery or inspection, the party in whose behalf it was made upon proof that the adverse party has failed to obey it and upon notice to him, may apply to the court for an order to punish him for the failure. Upon the hearing of the application, the court, upon the payment of such a sum for the expenses of the applicant as the court fixes and upon compliance with such other terms as it deems just to impose, may permit the party in default to comply with the order for a discovery and inspection; and for that purpose, it may direct that the application to punish him stand over to a future time. Upon the final hearing of the application to punish the party in default, the court, in a proper case, may direct that his complaint be dismissed or his answer or reply be stricken out and that judgment be rendered accordingly; or it may make an order striking out one or more causes of action, defenses, counterclaims or replies, interposed by him; or that he be debarred from maintaining a particular claim or defense in relation to which the discovery or inspection was sought. Where the party has failed to obey an order allowing an inspection by the adverse party and requiring him to furnish a copy or permit a copy to be taken, the court may also direct that the book, document or other paper be excluded from being given in evidence; or it may punish the party for a contempt; or both."

improper punishment as for a contempt merely. So far as the answer is stricken out as a punishment for contempt of court rather than a penalty for disobedience to the order, it comes within the condemnation of Hovey v. Elliott." * * *

"So far as the order goes beyond the preclusion of the proof which might presumptively be discovered if the papers were produced, it goes beyond the constitutional limitations upon the power to punish for contempt. When a defendant refuses to produce books and papers relating to the merits of the action, he may be deprived of the right to assert that, as far as they relate to the merits of the action, he has a good defense. The presumption arises that a failure to produce such evidence is an admission that it exists. The punishment is for withholding proof and is properly limited to excluding what the proof presumptively establishes. But to punish generally for a refusal to produce by striking out an entire answer, which not only puts in issue all the material allegations of the complaint but includes affirmative defenses, comes perilously near the denial of due process of law. Take, for example, the case where the answer includes affirmative defenses and counterclaims. The defendant by a failure to make proper discovery going to the merits of the entire action, may be precluded from denying the allegations of the complaint; by striking out his denials, but does any legitimate inference follow from such failure that it has not abundant proof to establish its defenses and counterclaims? The power to punish is limited by the presumption which attaches to the suppression of the evidence suppressed."*

A case analogous to the one at bar is **Levy et al. v. Emerson Steuben Mills, Inc.**, 157 Misc. 666, 284 N. Y. S. 532, in which the Court stated as follows:

"The plaintiffs, by failure to make proper discovery going to the merits of the counterclaim, may be pre-

*To the same effect, see also **Peters v. Berkeley et al.**, 219 App. Div. 261, 264, 219 N. Y. S. 709, 713.

> cluded from denying the allegations of the counterclaim by striking out the denials; but no legitimate inference follows from such failure that plaintiffs have not abundant proof to establish their complaint. 'The power to punish is limited by the presumption which attaches to the suppression of the evidence suppressed.' Feingold v. Walworth Bros., 238 N. Y. 446, 455, 144 N. E. 675, 678; People v. Henriques & Co., 267 N. Y. 398, 196 N. E. 304. Under such circumstances, plaintiff's failure to appear does not raise a presumption that there is no merit to the complaint, but solely the presumption that the evidence suppressed would have established defendant's counterclaim."

Yet this is the very thing which occurred in the present case. The trial court ordered the striking of defendants' pleadings, including affirmative defenses and counterclaims (R. I, 116). Under the law and the rule of the **Feingold** case, the presumption that, by failing to answer, defendants admit the truth of plaintiff's allegations cannot be stretched to that extent without infringing upon the constitutional safeguard of due process.

II.

Certiorari Should Issue, for the Circuit Court of Appeals, in Holding That the Action Is in Tort and in Upholding the Amendment of April 21, 1943, on the Ground That the First Amended Petition Sounded in Tort, Is in Conflict With Applicable Local Law.

1. The original petition was filed in the Circuit Court of Scott County, Missouri, on July 22, 1941 (R. I, 6-10). The petition describes the contract entered into between the parties (Counts 5, 6 and 7), copy of which is attached thereto (R. I, 7). Counts 9 and 11 allege that defendant "purporting to act under said agreement had its men and machinery doing some work on the tank" (R. I, 8). Counts 10 and 15 charge that defendant failed to comply

with certain terms of the contract (R. I, 8, 9). Count 16 alleges that defendant expressly stated that it would not perform the contract (R. I, 9). Count 17 charges that "on account of the breach of said agreement by defendant" plaintiff was damaged in the amount of Five Thousand Dollars ($5,000.00) for which it prays recovery (R. I, 9).

Thereafter, on August 2, 1941, while the case was still pending in the state court, plaintiff amended its petition by adding charges of malicious and fraudulent conduct on the part of defendants and by changing its prayer for damages to Four Thousand Dollars ($4,000.00) actual damages and One Thousand Dollars ($1,000.00) punitive damages (R. I, 22-27).*

On August 21, 1943, when the case was on trial in the Federal Court on the amount of damages, after the jury was impaneled and sworn, the Court allowed plaintiff to amend its petition by striking from paragraph 17 thereof the phrase "on account of the breach of said agreement by defendant" over defendants' objection that this amendment amounted to changing the cause of action from contract to tort (R. I, 200, 210).

On the foregoing facts, the opinion of the Circuit Court of Appeals held that plaintiff's complaint **as amended** stated a cause of action in tort and not in contract, and that, therefore, punitive damages were properly recoverable. As a basis for this conclusion, the Court cites the case of **Graff v. Lemp Brewing Co.**, 130 Mo. App. 618, 109 S. W. 1044, for the proposition that:

> "In Missouri the principle is recognized that where a covenant creates a duty, failure to perform that duty is the basis for an action in tort" (R. IV, 14).

*For an explanation of the Record and for reference to subsequent amendments of the amount of damages prayed for, see the Summary Statement of the Matter Involved, in the foregoing petition, supra, page 2, footnote.

The Circuit Court of Appeals, however, overlooked the fact that the **Lemp** case, which on retrial was reported as **Graff v. Lemp Brewing Co.**, 145 Mo. App. 364, 129 S. W. 1005, had been expressly overruled in **Kohnle v. Paxton,** 268 Mo. 463, 479, 188 S. W. 155, 159, 160. In this case the Supreme Court of Missouri stated as follows:

> "In the cases at bar the petitions sound in tort, but they do not disclose such active negligence independent of the contract as will support an action of this character. In view, therefore, of the strong trend of authority limiting the right of action in such cases to suits for a breach of the contract, we feel impelled to hold that the plaintiffs have mistaken their remedy. That much may be and has been said to the contrary, especially in the well-reasoned cases of Willcox v. Hines [100 Tenn. 538, 46 S. W. 297, 41 L. R. A. 278, 66 Am. St. Rep. 770], and Graff v. Brewing Co. [130 Mo. App. 618, 109 S. W. 1044], supra, we do not hesitate to admit; but, considering the nature of the actions, the relationship of the parties, as landlord and tenant, and the general law in regard to the force and effect of contracts, **the doctrine declared in these cases is not approved.**" (Our emphasis.)

This language was quoted with approval in **Lehtinen v. Continental Bldg. Co.**, 339 Mo. 438, 97 S. W. (2) 102, 107.

In **Norris v. Walker**, 232 Mo. App. 645, 110 S. W. (2d) 404, 408, the Court referred to the above cases and stated as follows:

> "So far as we have been able to ascertain, the last-mentioned case is the last pronouncement, on this subject, by any of the appellate courts of this state. The cases last mentioned specifically overrule the Lemp Cases, supra, and other contrary cases, and established the law in Missouri that a tenant may not ground an action in tort for personal injuries grow-

> ing out of the failure of a landlord to perform a contractual duty, except, of course, where he also owes such a duty **apart** from the contract. He must sue on his contract for the breach thereof; and the suit and the measure of his damages will be regulated by the law of contract. He may not have judgment for damages based on personal injuries where his cause of action is grounded on a **breach of contract.**"

Under these authorities it appears that in Missouri when plaintiff sues for **breach of contract,** he cannot recover on tort liability. Thus under the doctrine of **Erie Railroad Co. v. Tompkins,** 304 U. S. 64; **Meredith v. Winter Haven,** 32 U. S. 228, and **Vandenbark v. Owens-Illinois Glass Co.,** 311 U. S. 538, 543, certiorari should issue to reverse the decision of the Court of Appeals.

It is also well settled that mere allegations of negligence and carelessness do not convert a contract action into a tort action. Thus in **Genuine Panama Hat Works, Inc., v. Webb et al.** (D. C. N. Y.), 36 F. (2d) 265, 266, the Court stated as follows:

> "The allegation that a defendant negligently or carelessly failed to perform his contract does not convert what is really an action on a contract into an action in tort."

In **Shaw v. Great Atlantic & Pac. Tea Co.,** 189 S. C. 437, 441, 1 S. E. (2) 499, 500, plaintiff's petition charged that defendant had breached the contract with gross fraud. The Court held that the petition sounded in contract and stated as follows:

> "Considering the full scope and effect of the appellant's first cause of action and regarding its essential allegations for the purpose of determining the nature of the grievance complained of, we are convinced that it is one based upon contract, and that the incidental allegations with reference to fraud and deceit may be disregarded as surplusage."

In **Price et al. v. Whitaker,** 273 Ky. 499, 117 S. W. (2d) 203, 204, the Court said:

> "So far as the causes of action set out in the first two paragraphs are concerned, they are both ex contractu. While the second paragraph alleges that appellee **negligently** operated the mines, it is obvious that the liability is predicated upon a breach of the contractual duty to operate the mines in a workmanlike manner, and not simply upon negligence." (Court's emphasis.)

This case involves a situation analogous to the one presented by the case at bar. Breach of a contractual duty to perform in a workmanlike manner is not the basis for an action in tort but for one in contract.

In **Price v. Parker et al.,** 44 Misc. Rep. 582, 90 N. Y. S. 98, 99 (1904; Sup. Ct. Spec. Term N. Y. County), the Court said:

> "While it is true that incidentally certain allegations are made in the complaint as to conversion by the defendants and as to fraudulent conduct, the gravamen of the complaint and the substance of the cause of action are for breach of the contract * * *. Where the gravamen of the complaint is on contract, the fact that there are allegations therein charging tortious conduct on the part of the defendants is not enough to make the action one sounding in tort."

See in accord:

Dougherty v. California Kettleman Oil Royalties, Inc., 13 Cal. (2d) 174, 88 Pac. (2d) 690 (1939);

Graves v. Waite, 59 N. Y. 156 (1874);

Southern Pac. R. Co. v. Gonzales, 48 Ariz. 260, 61 Pac. (2d) 377 (1936);

Welch v. Jamaica Water Supply Co., 171 N. Y. S. 101 (1918; Sup. Ct., Appellate Term, Second Department);

Derk P. Yonkerman Co. v. Fullers Adv. Agency, 135 Fed. 613 (1905; Cir. Ct. N. D. Ill.);
Rosenthal & Doucette, Inc., v. United Last Co., 33 Fed. Supp. 213 (1940; D. C., D. Mass.).

2. It should be noted in this connection that the Court of Appeals apparently refused to follow the rule that in case of doubt as to whether a petition sounds in contract or in tort, the petition should be construed to be in contract (cf. R. IV, 28). In **Nathan v. Locke et al.,** 108 Cal. App. 158, 291 Pac. 286, affirming 287 Pac. 550, 551, the Court stated as follows:

> "Another rule which is universally accepted in determining the nature of an action of this kind is that, when it is not clear to which class the action belongs, it will ordinarily be construed as in contract rather than in tort. 1 C. J., p. 1015. The reason for this rule is that the construction should be against the pleader and the liability in contract is less extensive than the liability in tort."

Similarly, in **Shaw v. Great Atlantic & Pac. Tea Co.** (1939), 189 S. C. 437, 442, 1 S. E. (2d) 499, 500, the Court said:

> "Even if it could be said that it is doubtful whether the first cause of action in the case before us is on contract or in tort, the doubt must be resolved in favor of the former. Lawson v. Metropolitan Life Ins. Co. [169 S. C. 540, 169 S. E. 430]; Spratt Building & Loan Assn. v. Roper [160 S. C. 240, 158 S. E. 495]; V. P. Randolph & Co. v. Walker [78 S. C. 157, 59 S. E. 856]."

In **Southern Pac. R. Co. v. Gonzales,** 48 Ariz. 260, 283, 61 Pac. (2d) 377, 386, the Court stated as follows:

> "It is frequently, however, very difficult to determine to which class a complaint belongs. In such cases

of doubt the general rule for this, as well as other actions where the action becomes important, is set forth by us in Andersen v. Thude, 42 Ariz. 271, 25 Pac. (2d) 272, 273, as follows:

> 'It is the rule that if the complaint may be construed either as one in tort or one on contract, that it will be presumed to be the latter. Consolidated Flour Mills Co. v. Muegge, 127 Okla. 295, 260 Pac. 745; Nathan v. Locke, 108 Cal. App. 158, 287 Pac. 500, 291 Pac. 286.' ''

In the absence of Missouri decisions directly in point, the above cases are controlling of the present issue, and the Circuit Court of Appeals erred in refusing to follow the weight of authority.

(3) The Court of Appeals upheld the amendment of April 21, 1943, at the trial on damages whereby plaintiff was allowed to strike out from paragraph 17 of the amended complaint the words "on account of the breach of said agreement by defendant" (R. IV, 15). The court stated further that

> "if this in fact changed the action from one in contract to one in tort, or otherwise substantially affected what is alleged in the complaint, defendants could not have been in default. * * * But early in the course of the litigation plaintiff had amended its petition to ask for exemplary damages. Such damages are not recoverable in an action on contract" * * * (R. IV, 15).

And again:

> "A consideration of plaintiff's complaint **as amended** convinces that plaintiff intended to state its action in tort" * * * (R. IV, 14). (Our emphasis.)

The above language of the Circuit Court of Appeals refers to the first amended petition filed by plaintiff in the

state court of Scott County on August 2, 1941 (R. I, 22-27), as the basis on which the propriety of the amendment was tested, and the amendment found proper. The Court of Appeals states that the amendment of April 21, 1943, would not have been permissible but for the fact that plaintiff had already amended its original petition in the state court.

Under the provision of Rule 81 (c) of the Federal Rules of Civil Procedure,* it is obvious that the procedure prior to removal into the federal court is governed by state law. **Erie Railroad Co. v. Tompkins**, 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817; **Meredith v. Winter Haven**, 320 U. S. 228, 88 L. Ed. 1, 64 S. Ct. 7.

Under Missouri law, the propriety of amendments must be tested by a comparison with the **original petition.** This rule is supported by the weight of the authorities.

In **Jacobs v. Chicago, P. & St. L. R. Co.** (Mo. App., 1918), 204 S. W. 954, the question was whether the second amended petition constituted a departure from the original petition. The St. Louis Court of Appeals set forth the test of permissible amendments and stated as follows (loc. cit., p. 956):

> "In applying these tests we must compare the second amended with the original petition. The fact that plaintiff filed an intermediate amended petition does not alter the matter in that it is the original petition which must be looked to to adjudge whether there is a variance or a new cause of action stated in the amended pleading complained of. Purdy v. Pfaff (104 Mo. App. 331, 78 S. W. 824); Ross v. Land Co. (162 Mo. 317, 62 S. W. 984)."

Similarly, in **Bick v. Vaughn** (1909), 140 Mo. App. 595, 120 S. W. 618, 621, the Court held as follows:

---

*"Removed Actions. These rules apply to civil actions removed to the district courts of the United States from the state courts and govern all procedure **after removal.**" * * * (Our emphasis.)

"It is the established law that the relevancy of the amendment must be determined by reference to the original petition and the cause of action therein declared upon; and this is true irrespective of what may be contained in other amendments. In fact, such amended pleading is regarded as a continuation of the original pleading, and generally relates back and takes effect as of the date when the original petition was filed. 1 Ency. Pl. & Pr., 621."†

In **Steele v. Brazier** (1909), 139 Mo. App. 319, 123 S. W. 477, 482, the Court stated as follows:

"The purpose of determining whether the last amended petition in this case is a departure from the original cause of action, the second or last amended petition must be compared with the original petition though no objection was raised to the first amended petition on the ground of departure."

In the present case the original petition did not contain any prayer for punitive damages (R. I, 10) nor the allegations of malice and fraudulent intent which are found in the first amended petition (R. I, 22-27). Thus the amendment in question represents an improper departure if compared—as Missouri law requires it to be—with the **original petition** filed in the state court.

It is submitted that since the amendment of April 21, 1943, changed the cause of action from contract to tort either the amendment should have been denied, or defendants could not have been in default.

---

†See in accord, **Ingwerson v. Chicago & A. Ry. Co. et al.** (1910), 150 Mo. App. 374, 130 S. W. 411; **Kirchner v. Coroner et al.** (1938), 343 Mo. 443, 121 S. W. (2d) 796, 800; **Hammond v. Berkowitz** (1909), 139 Mo. App. 404, 123 S. W. 502.

III.

The Circuit Court of Appeals Erred in Affirming the District Court Which Denied the Admissibility of Defendants' Rebuttal Evidence on the Issue of Intent and Business Methods.

At the trial on the amount of damages, plaintiff was allowed to introduce evidence of defendants' intent, by showing "similar facts" committed by them, whereas defendants were denied the right to introduce evidence in rebuttal. The Circuit Court of Appeals held that the evidence introduced by plaintiff to show intention and business methods of defendants by way of similar transactions in other cities was properly admitted by the District Court (R. IV, pp. 17-18). Yet the Court of Appeals upheld the trial court which denied the admissibility of rebuttal evidence offered by defendants to negative said intent and custom. In these circumstances, the trial resulted in a denial to defendants of the procedural guaranties of due process.

Defendants duly urged their point at every permissible stage of the procedure. Thus, on December 11, 1942, defendants moved the District Court for leave to take depositions to show that their business methods had proved to be satisfactory to their customers, and that they enjoyed good reputation for their work (R. I, 185; II, 983). On February 2, 1943, the District Court entered an order, overruling said motion (R. I, 197-198; II, 983). On April 21, 1943, the motion was refiled by leave and again denied (R. I, 200, 208, 209; II, 984). When counsel for defendants stated to the jury that the proof would show that defendants had a record of satisfied customers, the Court ruled that such testimony would not be admissible (R. I, 235).

Defendants urged the same point in their motion for new trial in the District Court (R. II, 999, 1000, 1001) as

well as in their assignment of errors to the Circuit Court of Appeals (R. I, 4, §§4 and 5). In affirming the judgment below, the Circuit Court of Appeals has apparently, although not expressly, found against defendants. It would thus seem that the decision of the appellate court is in conflict with the weight of the authorities. There being no Missouri cases in point, the following decisions are controlling:

In **Parrott v. Atlantic & N. C. R. Co.**, 140 N. C. 546, 53 S. E. 432, the Court said:

> "The defendant was permitted to prove the habit or custom of Hinnant, the conductor, in regard to taking up tickets and checking passengers from all stations on the road. The conductor testified: 'This custom lets us know where the passenger is going and that we have taken his ticket.' It was offered by defendant to show that the conductor could not have overlooked the fact that he had once taken up plaintiff's ticket. The testimony of the witnesses of the plaintiff tended to rebut this custom and to show its fallibility, if it existed, by offering several instances when the same conductor had made the same mistake. 'Of the probative value of a person's habit or custom, as showing the doing on a specific occasion of the act which is the subject of the habit or custom, there can be no doubt.' Wigmore, Vol. 1, Sec. 92; Mathias v. O'Neill, 94 Mo. 527, 6 S. W. 253. **To rebut this, a negative habit may be shown by evidence tending to prove that there was no such habit or custom or that the custom was the contrary.** The plaintiff in this case undertook to deny the existence of such an infallible habit or custom by showing specific instances where the habit failed, if there was such a habit. How else could plaintiff contradict it? 'That a negative habit may be shown and not merely an affirmative one, seems unquestionable,' etc. 1 Wigmore, Sec. 376. The only way in which the value of the alleged custom could be judged was by subjecting it to the test of specific instances. The testimony was

competent for that purpose. State v. Railroad, 58 N. H. 411, and cases cited.

"Upon a careful examination of the record we find no error." (Our emphasis.)

Similarly, in **Ryan Gulch Reservoir Co. v. Swartz** (1928), 83 Colo. 225, 263 Pac. 728, 730-731, the Court held that:

"The defendant was permitted to offer evidence of similar character, and we do not think, in the circumstances, that there was error in admitting this testimony of plaintiff's witness Kelly, for it was in rebuttal to the testimony of a similar character on the part of the defendant. 22 C. J., p. 753; National Fuel Co. v. McNulty, 65 Colo. 176, 177 Pac. 979."

In **Jensen v. Omaha & Council Bluffs Street Ry. Co.,** 128 Neb. 21, 257 N. W. 257, the Court stated as follows:

"Defendant complains of the admission of rebuttal evidence as to the fact that at other places in the immediate vicinity defendant's trolley poles were placed at about the same distance from the street corner as was the hole in controversy. Defendant had introduced testimony and a plat showing the location of its trolley poles, indicating that they were set at a greater distance from the corner than was the hole in question. The rebuttal evidence tended to negative the evidence offered by defendant, and we think it was properly received."

In the present case, at the trial held on the mere issue of determining the amount of damages, plaintiff was allowed to show "similar facts" committed by defendants, as being material on the issue of their "intent," whereas defendants were denied the right to introduce evidence in rebuttal. In these circumstances, and under the above authorities, the trial resulted in a denial to defendants of the procedural guarantees of due process.

The fact that the Circuit Court of Appeals did not expressly pass on this issue which was fully presented to

it (R. IV, 31-35) should not be regarded as a ground for denying the writ of certiorari.

Ecker v. Western Pac. Railroad Corp., 318 U. S. 448, 489, 87 L. Ed. 892, 940, 63 S. Ct. 692, 715;
Story Parchment Co. v. Paterson Parchment Paper Co., 282 U. S. 555, 567, 75 L. Ed. 544, 550, 51 S. Ct. 248, 252;
Cole v. Ralph, 252 U. S. 286, 290, 64 L. Ed. 567, 574, 40 S. Ct. 321.

CONCLUSION.

From the foregoing we submit that your petitioners were denied the constitutional guarantees of due process, that under the applicable doctrines of the decisions of this Court rule 37 (d) of Civil Procedure could not have been used to punish these petitioners for their alleged past misconduct; that after judgment by default was entered against them, plaintiff was allowed to change the gist of its cause of action from contract to tort so as to support its prayer for punitive damages, and that at the trial on the amount of damages these petitioners were denied introduction of evidence to rebut plaintiff's evidence of "similar facts."

Your petitioners have been denied their day in court and respectfully submit that this Honorable Court should issue a writ of certiorari to review and reverse the judgment and opinion of the Circuit Court of Appeals for the 8th Circuit, and for such other relief as this Honorable Court may deem proper.

Respectfully submitted,

RUSH H. LIMBAUGH,
Cape Girardeau, Missouri,
WHITWORTH STOKES,
Nashville, Tennessee,
JACOB M. LASHLY,
St. Louis, Missouri,
Attorneys for Petitioners.